Dr Quah Thong Sai v Manonmoney a/p Subramoney & Ors

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12B–512 OF 2009
JOHN LOUIS O'HARA J
30 NOVEMBER 2011

Evidence — Presumption — Negligence — Whether court could presume appellant was negligent just because baby he delivered had suffered injuries during delivery

Tort — Negligence — Professional negligence — Medical practitioner — Baby delivered by appellant had suffered fracture and left brachial plexus injury — Whether appellant had breached duty of care — Whether SCJ erred in finding that delivery had been conducted improperly by appellant — Res ipsa ioquitur — Whether doctrine applied to present case — Damages — Quantum — Whether there was any reason for appellate interference

The appellant was the obstetrician who attended to the first respondent in the delivery of her baby, the second respondent. When the first respondent was admitted to the Hospital Lam Wah Ee ('HLWE') in anticipation of the delivery of her baby, she and her husband were informed that a caesarean section might be carried out if the progress of labour was slow. In the end the appellant delivered the baby by normal vaginal delivery ('the normal delivery'). Despite the difficulties he encountered in delivering the anterior shoulders of the baby, the appellant managed to deliver the baby weighing at 4.1kg by normal delivery. However, when the second respondent baby was handed over to the consultant paediatrician of the hospital, the latter noted that the baby had suffered a fracture of the right arm and left *brachial plexus* injury. These injuries were also confirmed by a later assessment carried out by a consultant orthopaedic surgeon whom the first respondent had consulted. The respondents filed an action for damages against the appellant. It was the respondents' claim that the appellant's negligence had led to the injuries suffered by the second respondent. The appellant denied breaching the duty of care and submitted that there were no indications that normal delivery would not be safe or would cause shoulder *dystocia*. According to the appellant he had taken all reasonable steps to manage the shoulder *dystocia* and to facilitate delivery. The sessions court judge ('SCJ') allowed the respondents' claim and awarded damages of RM72,000, interest and costs. The appellant appealed against liability and quantum while the respondents appealed against the quantum.

Held, allowing the appellant's appeal against liability but dismissing both the appellant's and respondents' appeal against quantum with no order as to costs:

(1) This court found that the SCJ had not accorded satisfactory and proper judicial appreciation to the evidence and in particular the testimony of the appellant. The respondents had given no evidence in support of any of the allegations of negligence as pleaded in their statement of claim. In fact no medical evidence was adduced to show that a caesarean section ought to have been carried out by the appellant or that the appellant had been negligent in the management and conduct of the delivery. In the absence of any such evidence, the SCJ erred in finding that the delivery had been conducted improperly by the appellant (see paras 24–27).

(2) The SCJ had further erred in his finding that the doctrine of *res ipsa loquitur* was applicable because the appellant had provided a reasonable explanation to show that the injuries suffered by the second respondent baby had occurred without any negligence on his part. The court could not presume the appellant was negligent just because the second respondent had suffered injuries during the delivery (see para 31).

(3) As for the quantum, there was no reason for appellate interference. Thus, both the second respondent's appeal and the appellant's appeal with regard to quantum were dismissed (see paras 33–35).

[Bahasa Malaysia summary

Perayu adalah pakar obstetri yang merawat responden pertama semasa kelahiran bayinya, responden kedua. Apabila responden pertama dimasukkan ke Hospital Lam Wah Ee ('HLWE') untuk menyambut kelahiran bayinya, dia dan suaminya telah diberitahu yang pembedahan *caesarean* mungkin perlu dilakukan jika proses pelahiran adalah perlahan. Akhirnya perayu telah menerima kelahiran bayi melalui pelahiran vagina biasa ('pelahiran biasa'). Meskipun berlaku kesukaran ketika dia mengeluarkan bahu *anterior* bayi, perayu berjaya melahirkan bayi seberat 4.2kg melalui pelahiran biasa. Walau bagaimanapun, apabila bayi responden kedua diserahkan kepada konsultan pakar paediatrik hospital, dia mendapati bayi mengalami keretakan di lengan kanan dan kecederaan *brankial plexus* di bahagian kiri, kecederaan tersebut juga disahkan oleh satu penilaian selanjutnya yang dijalankan oleh konsultan pakar bedah ortopaedik yang mana responden pertama telah mohon pendapat. Responden-responden telah memfailkan tindakan untuk ganti rugi terhadap perayu. Ia adalah tuntutan responden-responden bahawa kecuaian perayu telah membawa kepada kecederaan-kecederaan yang dialami oleh responden kedua. Perayu menafikan telah melanggar kewajipan berjaga-jaga dan berhujah bahawa tiada petanda yang menunjukkan pelahiran biasa tersebut tidak selamat atau menyebabkan bahu *dystocia*. Menurut perayu dia telah mengambil segala langkah munasabah untuk mengatasi bahu *dystocia* itu dan memudahkan pelahiran. Hakim mahkamah sesyen ('HMS') telah

membenarkan tuntutan responden-responden dan mengawardkan ganti rugi sejumlah RM72,000, faedah dan kos. Perayu telah merayu terhadap liabiliti dan kuantum manakala responden-responden telah merayu terhadap kuantum.

Diputuskan, membenarkan rayuan perayu terhadap liabiliti tetapi menolak kedua-dua rayuan perayu dan responden-responden terhadap kuantum tanpa perintah untuk kos:

(1) Mahkamah ini mendapati HMS tidak memberi penelitian kehakiman yang wajar dan memuaskan terhadap keterangan dan khususnya keterangan perayu. Responden-responden tidak memberikan keterangan sokongan berhubung apa-apa pengataan kecuaian sepertimana diplid dalam penyataan tuntutan mereka. Bahkan tiada keterangan perubatan telah dikemukakan untuk menunjukkan pembedahan caesarean patut dijalankan oleh perayu atau bahawa perayu telah cuai dalam menguruskan dan melakukan pelahiran itu. Dengan ketiadaan apa-apa keterangan seperti berikut, HMS telah terkhilaf dalam penemuan bahawa pelahiran itu telah dilakukan dengan tidak betul oleh perayu (lihat perenggan 24–27).

(2) HMS selanjutnya telah terkhilaf dalam penemuan beliau bahawa doktrin *res ipsa oquitor* adalah terpakai kerana perayu telah memberikan penjelasan munasabah untuk menunjukkan bahawa kecederan-kecederaan yang dialami oleh bayi responden kedua telah berlaku tanpa apa-apa kecuaian di pihaknya. Mahkamah tidak boleh mengandaikan yang perayu telah berlaku cuai hanya disebabkan responden kedua mengalami kecederaan-kecederaan semasa pelahiran itu (lihat perenggan 31).

(3) Berhubung kuantum, tiada sebab untuk pihak rayuan campur tangan. Oleh itu, rayuan responden kedua dan rayuan perayu berkaitan kuantum adalah ditolak (lihat perenggan 33–35).]

Notes

For cases on negligence, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 2381.

For cases on professional negligence, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1348–1428.

Cases referred to

Davies v Powell Duffryn Associated Collieries Ltd [1942] AC 601, HL (refd)

Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Harta Tuas Sdn Bhd v UB Usahafina Sdn Bhd [2005] MLJU 221; [2005] 6 CLJ 464, HC (refd)

Kerry v Carter [1969] 1 WLR 1327 (refd)
Lim Kim Chet & Anor v Multar bin Masngud [1984] 2 MLJ 165, PC (refd)
Payremalu a/l Veerapappan v Dr Amarjeet Kaur & Ors [2001] 3 MLJ 725, HC (refd)
Rani a/p Varatharajoo v Choong Kok Wai & Anor [2002] 7 MLJ 721, HC (refd)
Rosita bte Baharom & Anor v Sabedin bin Salleh [1992] 1 MLJ 379, HC (folld)
Sivalingam a/l Peraisamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
Topaiwah v Salleh [1968] 1 MLJ 284, FC (refd)
Wong Choon Mei & Anor v Dr Kuldeep Singh & Anor [1985] 2 MLJ 373, SC (refd)
Wong Thin Yit v Mohamed Ali [1971] 2 MLJ 175, FC (refd)
Woss Corporation Sdn Bhd v Regent Furniture Export Consortium Sdn Bhd [2004] 1 LNS 171, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 29

R Subramaniam (Subra & Partner) for the plaintiff.
JJ Chan (Shearn Delamore & Co) for the defendant.

John Louis O'Hara J:

INTRODUCTION

[1] This matter came before me as the hearing of:

(a) encl 2 — the second defendant's appeal in regard to liability and quantum; and

(b) encl 6 — the plaintiffs' appeal in regard to quantum,

handed down by the sessions court judge, Sessions Court No 1 George Town on 18 November 2009.

[2] In hearing the appeals from the decision of the session court judge, I was mindful of s 29 of the Courts of Judicature Act 1964 and as such I treated the appeals encls 2 and 6 as if they were rehearing of the plaintiff's suit against the defendants, albeit based upon the appeal record before me.

[3] Upon doing so, I allowed the second defendant's appeal encl 2 and set aside the SCJ's finding of liability on the part of the defendants. In regard to quantum I saw no reason for appellate interference and so I dismissed both the

second defendant's encl 2 and the plaintiffs' encl 6 in regard to quantum.

THE FACTUAL MATRIX

[4] Manonmoney a/p Subramoney the first plaintiff had in 1999 delivered her first child, a girl weighing 3kg by way of spontaneous vaginal delivery. She is the mother of Selyha, the second plaintiff who was born at the Hospital Lam Wah Ee ('HLWE') on 31 December 2000. Dr Quah Thong Sai ('the second defendant') was the obstetrician who attended the delivery of the second plaintiff.

[5] The first plaintiff had attended eight ante natal consultations at the HLWE before 31 December 2000. Consultations were uneventful and a normal vaginal delivery was expected in regard to the second plaintiff.

[6] On 31 December 2000 at about 9.15pm the first plaintiff was admitted to HLWE in anticipation of delivery. At 9.50 pm the second defendant assessed the first plaintiff condition and conducted a vaginal examination which revealed cervix dilated at 7–8cm.

[7] A short trial of labour was proposed, and both the first plaintiff and her husband were informed that if the progress of labour was slow, a caesarean section might be carried out, to which they agreed. Labour was then commenced with the artificial rupture of the membrane and the first plaintiff was encouraged to push to facilitate delivery.

[8] Another vaginal examination was carried out at 11.15pm, which showed full dilatation of the cervical opening and that the second plaintiff's scalp could already be seen at the vaginal opening. The delivery of the second plaintiff's head was facilitated by vacuum extraction performed by the second defendant.

[9] After the delivery of the second plaintiff's head, difficulty was encountered in delivering the anterior shoulders. Attempts were made to overcome the difficulty and the second plaintiff was finally delivered after 4–5 minutes at 11.38pm.

[10] The second plaintiff was immediately intubated and resuscitated, and was handed over to the consultant paediatrician of the hospital, Dr Cheang Hon Kit for further management and treatment. The second plaintiff's birth weight was 4.1kg. The second plaintiff was noted by Dr Cheang Hon Kit to have suffered a fracture to the mid shaft of the right *humerus* and left *brachial plexus* injury.

[11] The second plaintiff's condition and prognosis, as based on the assessment carried out on 26 July 2009 by Dr Chaudhury Dhiresh Kumar, a consultant orthopaedic surgeon practicing at Adventist Hospital Penang is that there is full movement of the right arm with no disabilities whatsoever, and that there is no active movement of the left shoulder joint and limited movement of the distal muscles/joints, as stated in his report dated 8 September 2009.

[12] The SCJ in allowing the plaintiffs' claim ordered the defendants to pay the plaintiffs RM72,000 interests and costs.

THE LAW

[13] Section 29 of the Courts of Judicature Act 1964 ('the Act') provides that all civil appeals from a subordinate court shall be by way of re-hearing and the High Court shall have the like powers and jurisdiction on the hearing of appeals as the Court of Appeal has on the hearing of appeals from the High Court. See also *Woss Corporation Sdn Bhd v Regent Furniture Export Consortium Sdn Bhd* [2004] 1 LNS 171, *Harta Tuas Sdn Bhd v UB Usahafina Sdn Bhd* [2005] MLJU 221; [2005] 6 CLJ 464 (both decisions of Low Hop Bing J as he then was).

[14] As regards the defendant's appeal against liability, as the SCJ's decision is based upon a finding of fact, an appellate court may in certain circumstances interfere with his findings. See *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 per Federal Court:

> But we are under a duty to intervene … where … the trial court has so fundamentally misdirected itself that one may safely say that no reasonable court which had properly directed Itself and asked the correct questions would have answered at the same conclusion.

See also *Rani a/p Varatharajoo v Choong Kok Wai & Anor* [2002] 7 MLJ 721 (head notes):

> … an appellate court was obliged to interfere where there was a misdirection on the part of the trial judge. In the instant case this court had to consider whether the trial judge had erred in assessing the evidence or in arriving at a conclusion based on the available evidence.

[15] See also *Lim Kim Chet & Anor v Multar bin Masngud* [1984] 2 MLJ 165, *Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Anor* [2005] 2 MLJ 1, *Wong Thin Yit v Mohamad Ali* [1971] 2 MLJ 175, *Kerry v Carter* [1969] 1 WLR 1327 per Lord Denning at p 1376:

> This court adopts in regard to apportionment the same attitude as it does to damages. We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts; but even if neither of these is shown, we will interfere if we are of the opinion that the judge was clearly wrong. … We are here to put right that which has gone wrong. If we think the judge below was wrong then we ought to say so and alter the apportionment accordingly.

[16] In regard to the issue of quantum I refer to:
Topaiwah v Salleh [1968] 1 MLJ 284 at p 285 per Azmi CJ:

> … so far as this court is concerned we should, to paraphrase Greer LJ in *Flint v Lovell* [1935] 1 KB 354 be disinclined to reverse the finding of the trial judge as to the amount of damages merely because we think that if we had tired the case in the first instance we should have given a lesser sum. To justify reversing him, we should be convince that he acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damage. The assessments which the court has made over the years from some guide to the kind of figure which is proper and which the appellate court will follow in the light of the special facts of each particular case …

and *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at pp 616–617 per Lord Wright:

> Where the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice, so the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount rule which will cover all cases but a good general guide is given by Greer LJ in *Flint v Lovell*.

[17] In effect the court before it interferes with an award of damages should be satisfied that the SCJ has acted on a wrong principle of law or has misapprehended the facts or has for these reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

THE REASONS FOR MY DECISION

[18] The basic facts are not in dispute. It is the inference that we derive from the facts that from the dispute between the parties ie whether the defendant was negligent or not.

[19] The burden of proof is on the plaintiff to show that the second

defendant had failed to manage and conduct the delivery with reasonable care and skill, contrary to the practice as expected of a competent medical practitioner, thereby causing the plaintiffs to suffer loss and damage.

[20] The plaintiffs attempted to prove their case by oral evidence of the first plaintiff as well as relying on a medical text called *'Shoulder Dystocia and Birth Injury, Prevention and Treatment'*, (3rd Ed), 2009. The plaintiffs did not adduce any medical evidence by calling an expert obstetrician. The plaintiffs' counsel said that they were relying on the unexplained reason why the defendant took 4–5 minutes to deliver the second plaintiff.

[21] The SCJ in his grounds of judgment stated as follows:

> 7) Bagaimanakah plaintif kedua boleh mendapat kecederaan jika defendan kedua telah melakukan Barnum maneuver dengan betul. Ini adalah kerana Barnum maneuver adalah salah satu manual maneuver yang dicipta untuk membantu melahirkan bayi dengan masalah shoulder systocia dengan selamat. Adalah didapati defendan kedua gagal melaksanakan 'delivery of the posterior arm maneuver' dengan betul. Ini menunjukkan defendan kedua telah cuai didalam melaksanakan tanggungjawabnya membantu plaintif pertama melahirkan plaintif kedua.

[22] He goes on at para 9 of his grounds as follows:

> 9. Oleh yang demikian doktrin res ipsa loquitur adalah terpakai terhadap defendan dua …Tidak ada penjelasan diberikan tentang apakah yang berlaku dalam masa 4 hingga 5 minit sehingga kelahiran plaintif kedua.

[23] At para 10 the SCJ reverses the burden of proof when he makes the following finding:

> 10. Pada penemuan fakta, adalah didapati defendan kedua telah gagal membuktikan bahawa dia tidak melakukan kecuaian semasa menyambut kelahiran plaintif kedua …

[24] It is my finding that the SCJ had misdirected himself in regard to his finding in para 10 of his grounds. I refer to *Payremalu a/l Veerapappan v Dr Amarjeet Kaur* [2001] 3 MLJ 725 per VT Singam J as follows:

> It is settled law that it is not for the defendants to disprove the allegations as contained under the particulars or negligence in the statement of claim as the legal burden of proof still rests on the plaintiff (see *Selvaduary v Chinniah* [1939] 1 LNS 107; [1939] 8 MLJ 253 at p 254, *Eastern Enterprises Ltd v Ong Choo Kim* [1969] 1 LNS 35; [1969] 1MLJ 236).

[25] It is my finding that the SCR has not accorded satisfactory and proper judicial appreciation to the evidence and in particular the testimony of the defendant.

[26] The plaintiffs gave no evidence in support of any of the allegations of negligence as pleaded. No medical evidence had been called by the plaintiffs through an expert obstetrician in support of the plaintiffs allegation that firstly, a caesarean section should have been carried out, that secondly, the delivery had been conducted improperly by the defendant, and that thirdly, the second defendant had been negligent in his management and conduct of the delivery.

[27] In the absence of any evidence adduced by the plaintiffs in support of their allegations of negligence as pleaded, the SCJ therefore erred in his finding that the appellant had failed to conduct the delivery of the posterior arm maneuver properly, when no medical evidence had been adduced to establish that delivery was not conducted properly. See *Payaremalu* at p 744:

> … this court is of the view that it was important for the plaintiff to have adduced medical or expert evidence to support the allegations contained in the statement of claim against the defendants and this could have also assisted the court or thrown some light in arriving at this decision but unfortunately there was no such evidence before the trial court.

[28] The second defendant denied breaching his duty of care to the plaintiffs. His evidence was to the effect that at all material time prior to or upon the onset of delivery, he had made the necessary assessments and that there were no indications that vaginal delivery would not be safe or that vaginal delivery would cause shoulder dystocia with all the attendant consequences; that the difficulty only arose after the delivery of the second plaintiff's head and that he had taken ail reasonable steps to manage the shoulder dystocia and to facilitate delivery.

[29] A perusal of the evidence shows that the 4–5 minutes were in fact not unexplained. The 4–5 minutes was because of the difficulty experienced in the delivery of the shoulder. It must be remembered that the baby when delivered was 4.1kg which is over nine lbs and the first plaintiff's effort is pushing was very poor.

[30] While it was not possible to cross-examine the medical text produced by the plaintiffs, the second defendant was deprived of his right to call his own expert medical witness, Dato' Dr Alex Matthews because he was in South Africa at the date of the hearing and the *hakim mahkamah sesyen* refused to grant the defendant an adjournment to allow the witness to attend court.

[31] The SCJ had further erred in his finding that the doctrine of *res ipsa foqutur* is applicable because the second defendant's evidence on the measures that had been taken in regard to the delivery is a reasonable explanation and show that the injury suffered by the second plaintiff had occurred without any negligence on the part of the second defendant. See *Wong Choon Mei & Anor v Dr Kuldeep Singh & Anor* [1985] 2 MLJ 373. To my mind there can be no presumption of negligence on the part of the second defendant just because the second plaintiff had suffered injuries during the delivery.

[32] In regard to damages awarded, the SCJ quantified them as follows:

(a) fracture of right arm in the midshaft of the humerus — RM12,000; and

(b) bracial plexus lesion of the left arm involving the C6, C7,C8 and T1 —RM60,000.

[33] Before a court interferes with an award of damages it should be satisfied that the SCJ had acted on a wrong principle of law or in effect has misapprehended the facts or has for these reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

[34] In regard to quantum, I see no reason for appellate interference and am dismissing both the second defendant's *notis rayuan lampiran* 2 and the plaintiff's *notis rayuan lampiran* 6 in regard to quantum.

CONCLUSION

[35] Therefore in regard to encl 2 and encl 6, quoting *Rosita bte Baharum & Anor v Sabedin b Salleh* [1992] 1 MLJ 379 at p 392 per Edgar Joseh Jr 'my human sympathies are for the plaintiff but I am not at liberty to indulge them' and so I conclude by allowing the second defendant's appeal against liability but dismiss both the second defendant's and plaintiffs' appeal against quantum with no order as to costs.

ORDER

[36] So ordered accordingly.

Appellant's appeal against liability allowed but both the appellant's and respondent's appeal against quantum dismissed with no order as to cost.

Reported by Kohila Nesan